IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.445 OF 2003

Jitendra Jagmohan Dodia
aged 40 years, R/a Room No.63,
Gulab Mension, Tisara Kumbharwada,
Mumbai-400004. At present lodged
at Kolhapur Central Prison. ..Appellant.
(orig.Accd.No.1)

V/s.

The State of Maharashtra. ..Respondent.

Mr.D.G.Khamkar for Appellant.

Mr.Y.S.Shinde, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : SEPTEMBER 20, 2006.

ORAL JUDGMENT :

1. This appeal takes exception to the Judgment and Order passed by the Additional Sessions Judge, Greater Bombay dated 6th February, 2002 in Sessions Case No. 1177 of 1992. The appellant has been found guilty of offence punishable under section 304(I) of I.P.Code and ordered to undergo sentence of four years rigorous imprisonment and to pay fine of Rs.2,000/-, in default to suffer further imprisonment for period of three months. The appellant was originally chargesheeted and tried for offence punishable under section 302 and 342 of I.P.Code. The appellant is however, acquitted of those charges,

but found guilty for offence under section 304(I) of I.P.Code.

2. In short the prosecution case is that, the appellant accused had sour relationship with his wife(since deceased). They were staying alongwith mother and brother of the appellant/accused and children born out of the wedlock of appellant and his wife (deceased Kiran) in room No.63 at 3rd Kumbhar Wada, 4th floor, Gulab Mansion. It is the prosecution case that due to quarrel between the appellant and his wife, the appellant had left his house for sometime and returned back home 15 days prior to the date of incident. On returning home, the appellant started staying with his family members. Even after his return there was no respite and the quarrel between the husband and wife continued unabated. On the fateful day on 19th July, 1992 at about 6 a.m. there was quarrel between the appellant and his wife Kiran on preparing tea. It is alleged that the appellant offered Rs.400/- to the deceased Kiran, but in the heat of anger Kiran threw away the said currency on the appellant and said that the appellant may better give the said amount to his mother Kantaben. As the quarrel escalated, it is stated that the appellant left home. However, the

appellant returned home at around 9.30 a.m. Once again quarrel between the husband and wife erupted. According to the prosecution, the appellant asked his mother and daughter Bhavana to go out of the room and poured kerosene on Kiran and set her ablaze with a matchstick. It is stated that Kiran cried for help as she was burning. It is alleged that Kantaben, who was waiting outside the room, heard such shouts and saw the appellant walking out of the room and locking the room from outside and going away. The said Kiran cried for help and tried to put out the fire by pouring water on herself. It is stated that the appellant/accused after sometime returned back with doctor to examine his wife. It is stated that P.W.6 B.T.Jadhav, API received the message on telephone that female was burnt at third Kumbhar Wada, Gulab Mansion, V.P.Road, Mumbai. He immediately made entry in the police diary to that effect and proceeded to the scene of offence. On reaching the scene of offence, P.W.6 API Jadhav found the appellant accused, his four years' daughter Bhavana and mother Kantaben present in the room and Kiran was lying on the cot covered with bedsheet(Chadar). According to this witness, he had enquired with Kiran about the cause of injury. Deceased Kiran named her husband having burnt her. As Kiran was seriously injured,

she was removed immediately to J.J.Hospital at about 12 noon and came to be admitted in emergency ward. The history of injury given at the time of admitting Kiran in J.J.Hospital is stated as an assault and attempt to burn by relatives. Kiran was given necessary treatment in the hospital. It is stated that P.W.6 API Jadhav intended to record the Dying Declaration(Exh.14) of Kiran. Accordingly, after taking approval from the doctor attending Kiran at the relevant time, dying declaration(Exh.14) came to be recorded. There is some controversy about whether the dying declaration is recorded after the arrival of SEO Vichare(P.W.4) or the API Jadhav(P.W.6) had already started recording statement of Kiran and completed the same substantially. Suffice it to observe that the dying declaration of Kiran is on record proved by the prosecution. Kiran succumbed to the injuries on 29th July, 1992. The Post Mortem report was prepared by Dr.Yusuf Machiswala attached to J.J.Hospital(P.W.3). The Post Mortem report examination reveals that Kiran had sustained 27% burn injuries mainly on the upper portion of her body and she succumbed to the said injuries. The appellant/accused was arrested on the date of incident. As Kiran died an unnatural death, offence under section 302 of I.P.Code came to be registered.

Investigation of the case was carried out by API Jadhav(P.W.6). On completing the investigation charge-sheet came to be filed. The appellant was charged for offence punishable under section 302 and 342 of I.P.Code.

3. To substantiate the charges, the prosecution examined in all six witnesses. P.W.2 Kantaben, mother of the appellant has been examined, who has spoken about the incident. Indeed, she has not seen how Kiran had caught fire as that episode had occurred inside the room. The prosecution has also examined P.W.1 Mohanlal Jain, who was staying in the neighbouring house. His evidence was to establish the seizure of clothes of the deceased Kiran, which were soaked and smelled like kerosene. Both these witnesses turned hostile, for which reason Court granted permission to the prosecution to cross-examine those witnesses. With regard to the fact of admission of Kiran in J.J.Hospital and treatment given to her including antemortem injuries suffered by her, prosecution examined Dr.Mohan Warang(P.W.5). Dr.Warang had not treated the deceased Kiran personally, but he deposed on the basis of the history and medical record as the doctor who had treated Kiran in the year 1992 was

unavailable to give evidence. Prosecution also examined Dr.Yusuf Machiswalla(P.W.3), who has deposed about the details of the post mortem conducted by him and the finding noted by him. As is mentioned earlier, prosecution has examined SEO Vichare(P.W.4), who was called for recording Dying Declaration(Exh.14), to be given by Kiran. Prosecution has also examined API Jadhav(P.W.6) who investigated the case and also recorded dying declaration himself in the presence of SEO Vichare(P.W.4). Rest of the witnesses could not be traced.

4. On analysing the above evidence, the Court below proceeded to record finding of guilt against the appellant/accused for offence punishable under section 304(I) of I.P.Code. The trial Court has noted that there was no dispute that death of Kiran, wife of appellant, on 29th July, 1992, was due to burn injuries suffered by her. As per the medical evidence, Kiran had suffered 27% burn injuries, mostly on the upper part of the chest and upper right limbs. Medical evidence also indicates that septicemia had developed and as per the opinion recorded in the post mortem report(Exh.12), Kiran died due to septicemia and shock due to thermal

burns. In other words, the fact that dying unnatural death was not put in issue before the trial Court. The defence of the appellant was mainly that Kiran committed suicide by pouring kerosine on her person. This defence is reiterated by the appellant/accused in his own words while recording statement under section 313 of Cr.P.Code. The trial Court has then noted that prosecution witness P.W.2 and P.W.1 had turned hostile, nevertheless the prosecution had succeeded in establishing the guilt of appellant in the commission of the crime on the basis of dying declaration(Exh.14) given by the deceased Kiran as recorded by API Jadhav(P.W.6). The trial Court accepted the dying declaration, to be truthful and sufficient to proceed against the appellant. Indeed, the efficacy of dying declaration (Exh.14) was questioned at the instance of the appellant/accused. But those objections have been negatived by the trial Court. The trial Court however, took the view that the prosecution has failed to prove that the case was covered by provisions of section 302 of I.P.Code, instead, according to the trial Court, the case would fall under section 304(I) of I.P.Code as the act of appellant itself proved his intention to cause such bodily injury, as is likely to cause death and not an act by which the death is caused and is done with the

intention of causing death. In so far as offence under section 342 of I.P.Code is concerned, as the concerned prosecution witnesses turned hostile, the trial Court observed that the prosecution failed to establish the allegation of wrongful confinement as required in section 342 of I.P.Code. Accordingly, the trial Court proceeded to convict the appellant only for offence punishable under section 304(I) of I.P.Code and ordered that he shall suffer rigorous imprisonment for four years and pay fine of Rs.2,000/-, in default to suffer further imprisonment for three months. This decision is subject matter of challenge before this Court.

5. The State has not challenged the adverse findings recorded by the trial Court against the prosecution. Accordingly, the only issue that requires to be considered in this appeal is whether the finding of guilt recorded by the Trial Court against the appellant/accused for offence punishable under section 304(I) of I.P.Code can be sustained in fact and in law.

6. The principal argument canvassed before this Court on behalf of the appellant/accused is that the dying declaration (Exh.14) will have to be excluded

from consideration and if that plea was to be accepted, there was no other legal evidence to proceed against the appellant. The efficacy of dying declaration (Exh.14) was assailed on behalf of the appellant on the following basis. Firstly, on account of failure of the prosecution to examine the concerned doctor, who had given permission for recording of the dying declaration(Exh.14), as claimed by SEO Vichare(P.W.4) and API Jadhav(P.W.6), the same was fatal to the prosecution case. It is then argued that there is no legal evidence on record to establish the fact that the deceased Kiran was in a fit condition to give her statement at the relevant time. It is submitted that even prosecution witnesses(P.W.4) and (P.W.6) who claimed to have recorded dying declaration (Exh.14) have not explicitly asserted that position. It was then argued that the prosecution case proceeded on the premiss that the SEO Vichare(P.W.4) was present at the relevant time, when the dying declaration was being recorded. In such a case, there was no reason for the Investigating Officer API Jadhav(P.W.6) to record statement of deceased Kiran. In other words, recording of statement by API Jadhav(P.W.6) inspite of the presence of, availability of SEO Vichare(P.W.4) to record such statement, was fatal to

the prosecution case. It was next contended that it has come in the evidence of the prosecution witnesses(P.W.4) and (P.W.6) that deceased Kiran was familiar with Hindi language. Morever, questions were put to her in Hindi language and she answered the same in Hindi language, whereas the dying declaration(Exh.14) has been recorded in Marathi. This, according to the appellant, is fatal to the prosecution case. It is lastly submitted that there is variance between the version of API Jadhav(P.W.6) and SEO Vichare(P.W.4) regarding time, endorsement and language as recorded. This variance was on material points, for which reason the dying declaration(Exh.14) will be of no avail. Moreorless, same contentions were raised before the trial Court at the instance of the appellant. The same have been negatived. Instead, the trial Court proceeded to hold that the dying declaration has been proved by the prosecution and the same appears to be truthful and trustworthy. This is the limited controversy, that is required to be considered in the present Judgment.

7. I shall straightway deal with the first grievance of the appellant that nonexamination of the concerned doctor by the prosecution is fatal. To

buttress this submission, counsel for the appellant would rely on the decision of our High Court in the case of **Shyamrao Vitthal Poiemwar V/s. State of Maharashtra, reported in 2001(4) Mh.L.J.233.** The Division Bench has observed that it is incumbent for the prosecution to place before the court the evidence of the Medical Officer who examined the declarant and certified that the declarant was in a fit mental condition to given statement. It is further observed that the satisfaction of either the executive Magistrate and the police officer regarding the mental fitness of the declarant to given the statement is not enough to discharge the burden on the prosecution to prove that the declarant was in a fit mental condition, when the dying declaration was recorded. Counsel for the appellant submitted that the exposition in this decision applies on all fours to the case in hand. On the other hand, the Public Prosecutor has placed reliance on the decision of the Constitution Bench of the Supreme Court in the case of **Laxman V/s. State of Maharashtra reported in AIR 2002 S.C.2973,** in particular, paragraph-3 thereof. In my opinion, the Public Prosecutor is right in contending that the observations in the case of **Shyamrao(supra)** are in the fact situation of that case. In view of the exposition of the Constitution

Bench of Supreme Court in the case of **Laxman(Supra),** it is not possible to countenance the wide statement of law canvassed before this court that nonexamination of the concerned doctor would impel the court to discard the entire dying declaration(Exh.14) as such. I am fortified in this opinion in view of the law expounded by the Apex Court in paragraph-3 in the case of **Laxman(Supra).** The same reads thus:

> "3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in externity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the

deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A

> certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

It is observed that where the eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. It presupposes that the fact that deceased was in a fit state and conscious state of mind to make the declaration need not be established only by examining the medical officer, but can also be spoken by the eye-witnessess. The examination of concerned doctor however, is only to reassure the court about the fitness of the mind of the declarant. In the present case, the prosecution witnesses SEO Vichare(P.W.4) as well as API Jadhav(P.W.6) have spoken about the fit state of mind of Kiran when her statement was being recorded. P.W.4 in his examination-in-chief has stated that after obtaining permission from the doctor he and Shri B.T.Jadhav went near the patient. He then states that patient was in a position to give statement. Indeed, he has not used the expression "fit state of mind" but he

has loosely used the expression that "the patient was in a position to give statement", which obviously denotes that the patient was in a fit state of mind to give such statement. He has then deposed that officer Shri Jadhav recorded the statement of deceased in his presence. The tenor of cross-examination of this witness was to challenge his presence at the relevant time. No direct case has been put to this witness about falsity of his claim asserted in the examination-in-chief that the patient was in a position to give the statement, not even suggestion has been put in that behalf. The trial Court on analysing the evidence of P.W.6 has rejected the defence theory that this witness was not present at the relevant time. On the other hand, it has clearly found that the presence of SEO Vichare(P.W.4) at the time of recording of dying declaration has been established from his evidence. The version given by SEO(P.W.4) about the relevant fact as to whether Kiran was in a fit state of mind to give her statement, is corroborated by the endorsement on the dying declaration(Exh.14) put by the doctor attending at the relevant time, initialled as Dr.MGR. It is noted that patient Kiran was in a state to give the statement. There is also evidence of P.W.6, who in fact has recorded statement of

deceased Kiran. He has stated that after initial treatment by seeking permission from doctor attending her(deceased Kiran), he recorded statement of victim. He has spoken about the endorsement obtained from the doctor, who was present in the ward to the effect that the victim was fit enough mentally and physically to give statement, as can be seen from the paragraph-4 of his deposition. Once again, even this witness is not confronted with regard to the assertion that the deceased-Kiran was in a fit state of mind to give her statement. This endorsement put by the doctor has been proved even by the evidence of P.W.5 Dr.Mohan R. Warang and hospital medical records produced before the lower Court. Accordingly, the argument canvassed before this Court that non-examination of concerned doctor, who had given endorsement about the state of mind of the patient is fatal to the prosecution case, cannot be countenanced.

8. That takes me to the next contention canvassed on behalf of the appellant. It was argued that there is no legal evidence to establish the fact that deceased Kiran was in a fit condition to give her statement. I have already answered this aspect while considering the first contention. For the same

reason, this submission will have to be negatived.

9. That takes me to the next contention that even though the SEO Vichare(P.W.4) was available, no explanation is forthcoming as to why API Jadhav(P.W.6) recorded the statement himself. In other words, according to the appellant, it was imperative for the SEO Vichare(P.W.4) to record the statement of deceased Kiran and having failed to do so, it is fatal to the prosecution case. This submission has been countered by the Public Prosecution by relying on two Supreme Court decisions. Reliance is placed on the decision in the case of **Mesu Dhondiba Vidhate V/s. State of Maharashtra reported in (2001) 10 Supreme Court Cases 63**. However, to my mind, the observation in this decision is in the peculiar fact situation of that case where it had come on record that at the time of recording of declaration the concerned SEM was unable to record the same himself due to injury on his hand and thus got it written from PSI. However, the Public Prosecutor has rightly pressed into service the exposition of the Constitution Bench of the Apex Court in the case of **Laxman(Supra),** wherein it is mentioned that when the dying declaration is recorded, no oath is necessary nor is the presence of

a magistrate absolutely necessary. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate, there is no specified statutory form for such recording. The recording of declaration by a magistrate is therefore only a matter of prudence, to reassure the Court about its authenticity. The Constitution Bench of the Apex Court has observed that what evidential value or weight should be attached to such statement necessarily depends on the facts and circumstances of each particular case. It is further observed that what is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. In the present case, the trial Court has analysed the evidence of P.W.4 and P.W.6 and found that these witnesses were independent witnesses. They had no cause to depose against the accused. Even though the dying declaration given by Kiran is entirely recorded in the handwriting of API Jadhav(P.W.6), evidence of SEO Vichare(P.W.4) fully supports not only the version of P.W.6 but also the disclosures made by Kiran, as has been recorded in the dying declaration. The trial Court has taken the view that there is no reason to doubt the truthfulness of such dying

declaration. I am in agreement with the said view. In other words, merely because SEO Vichare himself did not write down the statement in his own handwriting, that will not be the sole consideration for throwing out the dying declaration, which has been brought on record by the prosecution and duly proved and found to be otherwise natural and trustworthy.

10. The next question that requires to be considered is that the dying declaration has been recorded in the language, which was not known to Kiran. Let us consider the legal position on this issue. It is not mandatory to record the dying declaration in the language known to the declarant, though that may be a desirable situation. It may be desirable that the statement is recorded in the same form and language, in which the declarant has given the statement. The Public Prosecutor has invited my attention to the decision of the Apex Court in the case of **Mohd. Hoshan, A.P. and Anr. V/s. State of A.P. reported in 2002 SCC(Cri)1765.** In that case, the declarant was familiar and could understand Urdu language. She had given statement in Urdu, but the declaration recorded was in English language. The Apex Court found that after recording of statement

was completed, as it was in different language, the same was explained to the declarant in Hindi, who admitted its correctness. Whereafter, thumb impression of the declarant was obtained. The Court further observed that merely because the declarant was explained in Hindi does not mean that she could not understand the contents explained to her, though she knew Urdu. This view has been taken on the reasoning that Urdu and Hindi languages are in common use in Hyderabad. The fact remains that even in that case the declarant had given her statement in Urdu language, whereas the same was translated and written down by the officer in English language. The Apex Court rejected the argument that such declaration will have to be rejected. The Public Prosecutor has relied on another decision of the Apex Court in the case of **Ramesh Bisan Parteki V/s. The State of Maharashtra reported in 2001 Cri.L.J.3780**. The Division Bench of the Bombay High Court considered similar grievance. The declarant had given statement in Hindi, whereas the same was recorded by the Officer in Marathi. The Court rejected the criticism and held that the dying declaration cannot be discarded merely on the ground that it is recorded in different language than the one in which it was narrated by the declarant. This statement of law is

founded on the exposition of the Apex Court in the case of **Bakshish Singh V/s. State of Punjab reported in 1957 Cri. L.J.1459**. In the case of **Ganpat Mahadeo Mane V.s.State of Maharashtra** reported **in 1993 Cri.L.298**, the argument that the dying declaration was not recorded in the form in which declarant had given reply came to be rejected. It is held that recording of dying declaration by way of separate questions and answer, the value of the dying declaration is not detracted. This decision answers the grievance made by the appellant in this behalf.

11. In the present case, there is evidence of P.W.4 and P.W.6 that after recording of the statement was completed, before obtaining thumb impression of the patient and counter signature of the officer, it was read over and explained to the patient in Hindi language, which she understood. These witnesses have also deposed that the patient found that her statement was correctly recorded as given by her. Once again defence has not confronted P.W.4 in regard to this assertion; not even a suggestion is given that the patient was not explained the contents of the statement in Hindi language before her thumb impression was taken over. It is however, suggested that patient did not accept the correctness of the

statement so recorded, which is denied. Similar is the position with regard to the evidence of P.W.6 API Jadhav. Suffice it to observe that the trial Court has rightly rejected this grievance of the appellant.

12. It was lastly submitted that there is variance between the version of API Jadhav(P.W.6) and SEO Vichare(P.W.4) regarding time, endorsement and language. Indeed, there is discrepancy in the evidence of P.W.6 and P.W.4, as to when the SEO Vichare arrived in the hospital. According to P.W.4, on receiving message he left for the hospital. He went to the concerned ward where the patient was admitted. He noticed that API Jadhav(P.W.6) was present in the ward. He has then stated that he obtained permission from the doctor and he and API Jadhav went near the patient and as the patient was in a position to give statement, API Jadhav started recording statement of patient in his presence. He has then spoken about the contents of the dying declaration given by the patient as has been recorded by API Jadhav in Exh. 14. He has also spoken about the details as to how the recording of statement proceeded, the manner in which questions were asked and replied and transcribed in the form of statement Exh. 14. On the other hand, P.W.6 has deposed that

when he was "about to record" statement of the declarant, SEO Vichare arrived in the hospital. Even if the evidence of P.W.6 was to be analysed critically, it is not possible to take the view that SEO Vichare(P.W.4) arrived in the hospital after the recording of statement was completed by P.W.6. The trial Court has analysed the evidence of both these witnesses. The discrepancy regarding the time of arrival of SEO Vichare(P.W.4) was not of such a nature to infer that SEO Vichare(P.W.4) was not present at all, when the material statement of declarant was being recorded. The defence has not been able to challenge the prosecution evidence in this regard. Suffice it to observe that such variation is not fatal; that too to doubt the presence of SEO Vichare(P.W.4) at the time of recording of the statement. For, P.W.4 has spoken about the details as to how the recording of statement was proceeded. That version has remained unshaken. Even with regard to the variation in the evidence of P.W.6 and P.W.4 in respect of the endorsement or the language in which the statement was recorded, that is not of such a nature so as to doubt the presence of any of these witnesses at the relevant time. The presence of both these witnesses at the time of recording of dying declaration will

have to be accepted. Both these witnesses are independent witnesses. Substance of the statement made by Kiran is deposed to by these witnesses. The trial Court, in my view, has rightly accepted the evidence of both these witnesses as truthful and independent.

13. In my opinion, none of the grievances made before this Court either singularly or all of them considered together can be the basis to discard the dying declaration(Exh.14), which seems to be natural and truthful version given by the deceased. She has spoken about the sequence in which events unfolded. She has spoken about the presence of appellant/accused at the relevant time and the quarrel that ensued between them. She has stated the manner in which she was drowsed with kerosine and the accused put her ablaze with the help of a match-stick. The theory propounded by the defence of Kiran having caught fire due to accident viz., bursting of kerosine stove, is belied by the positive case of the appellant- as noted in the Statement under section 313 of Cr.P.Code, that Kiran committed suicide. However, that defence also cannot be accepted. Taking over all view of the matter, to my mind, the trial Court was justified in recording

finding of guilt against the appellant for putting Kiran on fire on the fateful day. That finding of fact will have to be affirmed.

14. The Trial Court has proceeded to record finding of guilt on the basis of the dying declaration (Exh.14), which indicates the complicity of the appellant/accused in the commission of the crime. Although prosecution has examined P.W.1 and P.W.2, both these witnesses turned hostile. Smt.Kantaben Dedia (P.W.2) is the mother of appellant (mother-in-law of Kiran). In examination-in-chief she did not support the prosecution case. Prosecution therefore, applied for declaring her as hostile witness, which request was accepted. The prosecution was allowed to cross-examine this witness. In the cross-examination conducted by the Public Prosecutor, P.W.2 has stated as follows:

> "Thereafter again quarrel started between husband and wife and there was scuffle in between them. I tried to intervene. At that time Kiran started arguing with me. ..... As Jitendra driven me and his children outside the room we sat outside the room. Again they started quarrelling in loud voice. After some time I heard the voice of my daughter-in-law, I am burn, Save. Hence, I rushed to the door, Jitendra came outside, put the lock to the door and without saying anything he went out."

This version of P.W.2 clearly indicates complicity of the appellant. It is well established position that even if the witness is declared hostile, that does not mean that his entire evidence is to be discarded. It is open to the Court to cull out such evidence, which supports the prosecution case. In the present case the abovesaid evidence of P.W.2 has remained unchallenged. The appellant was offered opportunity to cross-examine this witness. The only question put in the cross-examination of P.W.2 at the instance of the appellant, read thus:

> "5. My another son Vijay and my mother-in-law were also residing in the same room at the time of incident. Nature of my daughter-in-law was of quarrelsum nature. My daughter-in-law desire that she alone want to stay in the room and we people to the driven away from the room."

In other words, the version given by P.W.2, albeit during the cross-examination by the Public Prosecutor after she was declared hostile, clearly indicates the complicity of the appellant. Indeed, the trial Court has not examined the matter from this perspective. Suffice it to observe that no fault can be found with the conclusion reached by the trial Court in recording finding of guilt against the accused for offence punishable under section 304(I) of I.P.Code. If the above evidence of P.W.2 was to be accepted, it

is possible to take the view that the prosecution has also established the case of wrongful confinement of deceased Kiran, after she was put on fire by the appellant, while he went out of the house and locked the room from outside. Thereby committed offence under section 342 of I.P.Code. However, as the State has not challenged the said finding, it is not necessary to dwell upon that aspect.

15. Hence, for the aforesaid reasons, appeal is dismissed, being devoid of merits.

16. I am informed that the appellant has already undergone the sentence awarded by the trial Court and has been released thereafter.